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Goodwin v. Turner: A Comparison of American and Jewish Legal Perspectives on Procreation Rights of Prisoners

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INTRODUCTION

Constitutional concerns arise when prisoners are stripped of certain fundamental rights. Courts have determined that many rights survive incarceration, inasmuch as they do not infringe upon the legitimate penological interests of the correctional institution. However, if an otherwise protected right is in conflict with a prisoner's status as an inmate, that right may be infringed upon in order to facilitate the objectives of the correctional facility.

The right to procreate has been deemed a fundamental right by the United States Supreme Court. Nonetheless, the privacy interest in procreation can be limited by a correctional institution if the restriction is reasonably related to furthering a legitimate penological interest. In *Goodwin v. Turner*,¹ the United States Court of Appeals for the Eighth Circuit denied an inmate the right to procreate through artificial insemination because that method of procreation conflicted with achieving

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¹ *Goodwin v. Turner*, 908 F.2d 1395 (8th Cir. 1990).

a legitimate penological interest – treating all inmates equally, to the greatest extent possible.

This Article examines the Eighth Circuit's decision in *Goodwin*, illustrates why the holding may not satisfy the required rational basis level of scrutiny, and proposes that the Eighth Circuit may have incorrectly denied Goodwin his fundamental right to procreate. The *Goodwin* holding is then contrasted with classic and recent Jewish law ("halacha"). Part I reviews the privacy interest in procreation and the need to protect that right so long as it does not conflict with an inmate's status as a prisoner. Part II discusses penological objectives and limitations on conjugal visits, and demonstrates why artificial insemination may be the only method available to protect a prisoner's right to procreate. Part III discusses the facts of *Goodwin v. Turner* and the court's reasoning for employing a rational basis standard. Part III also analyzes the shortcomings of *Goodwin*, arguing that the majority's decision fails to satisfy a rational basis level of scrutiny and therefore unjustly denies Goodwin his constitutional right to procreate. Part IV discusses the comparative Jewish legal issues.

I. PROTECTED PRIVACY INTEREST IN PROCREATION

The Supreme Court has held that the liberty interest guaranteed to all citizens by the Fourteenth Amendment² encompasses a "right of personal privacy, or a guarantee of certain areas or zones of privacy."³ This zone of privacy includes freedom from governmental interference concerning marriage,⁴ contraception,⁵ abortion,⁶ and procreation.⁷

² The Fourteenth Amendment states, in part, "nor shall any State deprive any person of life, liberty, or property." U.S. CONST. amend. XIV, § 1.

³ *Roe v. Wade*, 410 U.S. 113, 152 (1973).

⁴ See *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (holding that a statutory scheme that prohibited interracial marriages solely on the basis of racial classifications violated the Fourteenth Amendment); see also *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (stating in dictum that marriage was a fundamental right). Note, however, that state courts have defined marriage to be the legal union of a man and a woman. They do not recognize the rights of homosexuals to marry. See, e.g., *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974).

⁵ See *Eisenstadt v. Bard*, 405 U.S. 438, 453 (1972) (holding that the right of privacy includes the right of the individual to decide whether or not to use contraception).

⁶ See *Roe*, 410 U.S. at 152-53 (holding that the zone of privacy encompasses a woman's choice whether or not to have an abortion).

⁷ See *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (striking down a statute

While imprisonment automatically limits some privacy rights otherwise guaranteed through the Fourteenth Amendment,⁸ courts have established that inmates retain certain rights that are "not inconsistent with [their] status as a prisoner or with the legitimate penological objectives of the corrections system,"⁹ because there is no "iron curtain" drawn between the Constitution and the prisons of the country.¹⁰ Many courts have ruled that certain privacy interests of prisoners, including the right to procreate,¹¹ are fundamental and thus survive incarceration. Although there are instances when this right to procreational choice may constitutionally be limited, it cannot be completely denied.¹²

that required mandatory sterilization of convicted felons whose crimes involved moral turpitude).

⁸ See, e.g., *Hudson v. Palmer* 468 U.S. 517, 526 (1984) (ruling that the security interests of a correctional facility override an inmate's Fourth Amendment protection against an unreasonable search in a prison cell).

⁹ *Pell v. Procunier*, 417 U.S. 817, 822 (1974) (holding that prison regulation restricting media representative's ability to select particular inmate for interview and preventing prisoner himself from initiating an interview did not violate either the press' or prisoner's First Amendment rights because alternative means of communication were available); see also *Turner v. Safley*, 482 U.S. 78 (1987) (holding that the right to marry survives incarceration).

¹⁰ *Hudson*, 468 U.S. at 523 (quoting *Wolff v. McDonnell*, 418 U.S. 539, 555 (1974)).

¹¹ See *Skinner*, 316 U.S. at 541. The Court recognized that even with prisoners, "we are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race." *Id.* The Court, in noting the need to strictly scrutinize statutes that irreparably deprive certain individuals of the basic right to procreate, indicated that even inmates retain some right to procreate. See *id.*, see also *Goodwin v. Turner*, 908 F.2d 1395, 1401 (8th Cir. 1990). Judge McMillian, in his dissenting opinion in *Goodwin*, argued that *Skinner* and *Turner*, when read together, strongly suggest that the right to procreate survives incarceration because "marriage and procreation are fundamental to the very existence and survival of the race." *Id.* at 1402 (McMillian, J., dissenting). Judge McMillian reasoned that the stability and progress of our society are enhanced when marriage and procreation are viewed in tandem. See *id.* (McMillian, J., dissenting); see also Christen M. Davis, Note, *Inmates and Artificial Insemination: A New Perspective on Prisoners' Residual Right To Procreate*, 44 WASH. U. J. URB. & CONTEMP. L. 163 (1993).

¹² Courts have recognized the procreational rights of female inmates. See *Monmouth County Correctional Institutional Inmates v. Lanzaro*, 834 F.2d 326 (3d Cir. 1987) (holding that women have a fundamental right to choose to terminate a pregnancy, and the costs incurred in accommodating prisoners' constitutional rights

II. PENOLOGICAL OBJECTIVES

Courts have consistently held that restrictions on the constitutional rights of inmates are justified if upholding those rights becomes inconsistent with the legitimate penological objectives of the correctional facility.¹³ These objectives are twofold. First, incarceration is intended to accomplish deterrence, incapacitation, rehabilitation, and retribution.¹⁴ The second objective is to preserve prison security by maintaining order within the correctional facility.¹⁵ To facilitate the accomplishment of the second objective, courts give prison officials who restrict inmates' constitutional rights a high degree of deference.¹⁶

This deference is demonstrated by the fact that conjugal visits with spouses have never been deemed a constitutional right.¹⁷ While courts have

cannot justify the complete deprivation of these rights).

¹³ See, e.g., *Pell*, 417 U.S. at 822.

¹⁴ See *id.* (stating that the purposes of incarceration include deterrence, incapacitation, rehabilitation, and maintenance of institutional security within the prison); *Hudson*, 468 U.S. at 520 (holding that the restrictions placed on prisoners help achieve the objectives of justice, such as deterrence and retribution); see also SHELTON KRANTZ & LYNN S. BRAHNAM, *THE LAW OF SENTENCING, CORRECTIONS AND PRISONERS' RIGHTS* 270-71 (4th ed. 1991). The authors discuss and explain the four purposes that incarceration may serve. The first purpose, incapacitation, benefits a free society by physically restricting, or incapacitating, individuals, which prevents them from committing many crimes that might otherwise be committed during the period they are incarcerated. The second purpose, deterrence, aims to prevent the free public and those locked away from engaging in future criminal activity because of fear of imprisonment. The third purpose, rehabilitation, aspires to cure prisoners from the desire to commit crimes. The fourth purpose, retribution, punishes prisoners for the crimes they have committed.

¹⁵ See *Bell v. Wolfish*, 441 U.S. 520, 540 (1979) (upholding searches of inmates after contact visits with outsiders because prisons must be allowed to adopt measures that maintain security and order); *Pell*, 417 U.S. at 823 (declaring that a prison's security interest is "central to all other correctional goals").

¹⁶ See *Block v. Rutherford*, 468 U.S. 576, 589 (1984) (upholding a county jail's blanket prohibition on contact visitation with pretrial detainees; the Court concluded that it was necessary to defer to the experienced judgment of the jail's administration as to what measures were necessary to achieve the jail's legitimate interest in maintaining security.).

¹⁷ While some states have implemented conjugal visitation programs, the United States Bureau of Prisons, the body that controls the federal prison system, has never adopted such a program. See Thomas M. Bates, Note, *Rethinking Conjugal Visitation in Light of the "AIDS" Crisis*, 15 NEW ENG. J. ON CRIM. & CIV

recognized that a prisoner's interest in procreational choice and marriage survives incarceration,¹⁸ they have concluded that for a prisoner to maintain a sexual relationship is logically inconsistent with his or her incarceration and the prison's interest in security.¹⁹ Such prohibition on conjugal visitation directly infringes upon the procreational rights of prisoners, leaving artificial insemination perhaps the only way to preserve inmates' fundamental right to procreate.

III. A MALE INMATE'S RIGHT TO PROCREATE

A. *Goodwin v. Turner*

The constitutional question of whether a male inmate may be denied the right to procreate by artificially inseminating his wife was at issue in *Goodwin v. Turner*.²⁰ Steven Goodwin, a federal prisoner in Missouri, requested authorization and assistance from prison officials to artificially inseminate his wife.²¹ The Bureau of Prisons ("Bureau") denied the request, stating that it had no program or provisions for implementing it.²² Goodwin then brought suit in federal district court in an attempt to compel the Bureau to "provide [him] with a clean container in which to deposit his ejaculate, and a means of swiftly transporting the ejaculate outside the prison."²³ The district court held that Goodwin did not have a "fundamental

CONFINEMENT 121 (1989).

¹⁸ See *supra* notes 2-12 and accompanying text for a discussion of prisoners' surviving interest in procreational choice and marriage.

¹⁹ See, e.g., *Lyons v. Gillian*, 382 F. Supp. 198, 200 (N.D. Ohio 1974) (holding that the state is not obligated to make private places available for prisoners to maintain sexual relations because intrusion into a prisoner's privacy rights is not "tantamount to an intrusion into the prisoner's home"); see also *McGinnis v. Stevens*, 543 P.2d 1221, 1238 (Alaska 1975) (finding that "notions of privacy of the marital bed [are] inconsistent with the compelling state interest in incarceration of offenders").

²⁰ *Goodwin v. Turner*, 908 F.2d 1395 (8th Cir. 1990).

²¹ See *id.* at 1397.

²² See *id.*

²³ *Id.* at 1398. Goodwin initially asked for four things in a writ of habeas corpus. First, he requested that he be permitted to produce acceptable semen for impregnating his wife. Second, he asked that a medical doctor be allowed to enter the institution for the purpose of properly collecting and freezing his semen. Third, he wanted to be tested for sexually transmitted diseases. And fourth, he wanted to be assured that he would not be transferred to another institution until the dispute

constitutional right to father a child through artificial insemination that survive[d] incarceration."²⁴

On appeal, Goodwin argued that the district court erred in its holding.²⁵ The appellate court assumed, without discussion, that Goodwin did indeed retain his right to procreate while incarcerated,²⁶ and focused its attention on whether the regulation was reasonably related to achieving its legitimate penological interest.²⁷ Applying a reasonableness test as set forth in *Turner v. Safley*,²⁸ the court held that even though granting Goodwin's request would have been relatively simple, it was acceptable to deny it because the prohibition of insemination was rationally related to the legitimate penological objective of treating all inmates equally.²⁹ The regulation was reasonable even though alternatives were not available to Goodwin.³⁰ The court noted that accommodating Goodwin's request would force the Bureau to grant female inmates expanded medical services to accommodate pregnancies, thereby diverting resources from security and other legitimate penological interests.³¹

The dissent by Judge McMillian argued that the majority was wrong in finding that the regulation was reasonable.³² The dissent did not address the appropriate level of scrutiny for the prison regulation. Instead, Judge McMillian maintained that an inmate retains his or her right to procreate while incarcerated, and argued that the blanket prohibition on artificial insemination would not pass constitutional muster even under the rational basis test.³³

was fully resolved. The magistrate decided that Goodwin should resubmit his request in a clear and detailed fashion, so that the Bureau could accommodate his request or make specific objections. In response to this decision, the Bureau adopted a blanket policy refusing all artificial insemination requests because it would be difficult to treat men and women equally and all institutions would have to develop collection, handling, and storage procedures. In turn, Goodwin then filed suit, amending his request as described in text above. *See id.* at 1397

²⁴ *Goodwin v. Turner*, 702 F. Supp. 1452, 1453 (W.D. Mo. 1988), *aff'd*, 908 F.2d 1395 (8th Cir. 1990).

²⁵ *See Goodwin*, 908 F.2d at 1398.

²⁶ *See id.*

²⁷ *See id.*

²⁸ *Turner v. Safley*, 482 U.S. 78 (1987) (*see infra* notes 56-98 and accompanying text).

²⁹ *See Goodwin*, 908 F.2d at 1399.

³⁰ *See id.*

³¹ *See id.* at 1400.

³² *See id.* (McMillian, J., dissenting).

³³ *See id.* at 1404 (McMillian, J., dissenting).

B. Standard of Review Used to Deny Procreational Rights

The issue that confronted the Eighth Circuit in *Goodwin* was whether prohibiting a male inmate from artificially inseminating his spouse was a violation of his constitutional right to father a child.³⁴ The majority in *Goodwin* concluded that security risks, scarce resources, and equal protection concerns were valid penological concerns sufficient to justify the restriction. However, the majority may have erred in finding that the blanket prohibition on inmate procreation through artificial insemination was reasonable.

The majority asserted that the appropriate level of review for the restriction placed upon Goodwin's fundamental constitutional right was not heightened scrutiny, but rather mere rationality.³⁵ The majority noted that in *Washington v. Harper*³⁶ the Supreme Court explained that the "proper standard for determining the validity of a prison regulation claimed to infringe on an inmate's constitutional rights is to ask whether the regulation is 'reasonably related to legitimate penological interests.'"³⁷ The *Goodwin* court went on to state that this standard must be applied even when the "constitutional right claimed to have been infringed [upon] is fundamental, and the State under other circumstances would [be] required to satisfy a more rigorous standard of review."³⁸ Because Goodwin was incarcerated, a mere rational basis standard was the appropriate level of scrutiny to use to ascertain whether the Bureau could lawfully deny Goodwin his constitutional right to procreate.³⁹

Courts have confirmed that inmates retain only limited constitutional rights upon incarceration; nevertheless, constitutional concerns arise when courts are permitted to simply "rubber stamp" prison regulations that infringe upon rights without any justification.⁴⁰ The need for a uniform standard for determining whether a prison regulation is valid prompted the Court, in *Procunier v. Martinez*,⁴¹ to devise such a standard. The prison rule in question authorized censorship of prisoners' correspondence and thus implicated prisoners' First Amendment right to free speech. Thus, complete deference to prison administrators was inappropriate, and the Court

³⁴ See *id.* at 1399.

³⁵ See *id.*

³⁶ *Washington v. Harper*, 494 U.S. 210 (1990).

³⁷ *Goodwin*, 908 F.2d at 1398 (quoting *Harper*, 494 U.S. at 224).

³⁸ *Id.* at 1398-99.

³⁹ See *id.*

⁴⁰ See Davis, *supra* note 11, at 175.

⁴¹ *Procunier v. Martinez*, 416 U.S. 396 (1974).

balanced penological interests and prisoners' rights⁴² in holding that the regulation must further an important penological interest unrelated to the suppression of unpopular ideas and must be no more restrictive than necessary.⁴³ Applying the new standard, the Court found that the prison failed to demonstrate that the censorship regulations promoted an important interest.⁴⁴

In *Martinez*, the Court employed an intermediate level of scrutiny finding the prison rules unconstitutional.⁴⁵ The Court reasoned that restricting inmate correspondence necessarily endangered the First Amendment rights of nonprisoners.⁴⁶ The fact that the *Martinez* holding did not turn solely on prisoners' rights helps to explain the Court's departure from its traditional deference to prison administrators.⁴⁷

Several years later, however, the Court returned to "rubber stamping" prison regulations when it held in *Thornburgh v. Abbott*⁴⁸ that post-*Martinez* decisions need only apply a reasonableness test to analyze the constitutionality of challenged regulations affecting the rights of both prisoners and nonprisoners.⁴⁹ This decision to subject prison officials to the least restrictive standard reflected the Court's concern that the *Martinez* standard effectively removed from prison officials the degree of discretion they had enjoyed previously.⁵⁰ In *Thornburgh*, the Court rejected a heightened scrutiny standard and shifted back to favoring the rational basis level of review.⁵¹

⁴² See *id.* at 407.

⁴³ See *id.* at 413. The use of a least-restrictive-means standard eliminated the danger that unnecessarily broad regulations would pass constitutional muster. See Davis, *supra* note 11, at 176 n.88.

⁴⁴ See *Martinez*, 416 U.S. at 415.

⁴⁵ See *id.* at 414.

⁴⁶ See *id.* at 408.

⁴⁷ See *id.* at 409.

⁴⁸ *Thornburgh v. Abbott*, 490 U.S. 401 (1989).

⁴⁹ See *id.* at 407; see Davis, *supra* note 11, at 181-85, for a discussion of *Thornburgh's* rubber-stamping policy.

⁵⁰ See *Thornburgh*, 490 U.S. at 409-11. The Court viewed the *Martinez* standing as inappropriate for "consideration of regulations that are centrally concerned with the maintenance of order and security within prisons." *Id.* at 409-10.

⁵¹ The *Thornburgh* Court, by approving the *Turner* test, made it clear that lower courts should follow its lead in extending deference to the decisions of prison administrators. See *id.* at 414-19 (applying the *Turner* factors); *Turner v. Safley*, 482 U.S. 78, 89-91 (1987); Megan M. McDonald, Note, *Thornburgh v. Abbott: Slamming the Prison Gates on Constitutional Rights*, 17 PEPP. L. REV. 1011, 1040-

In *Goodwin v. Turner*, a prisoner argued that the Bureau of Prisons' blanket policy against artificial insemination directly affected the procreational rights of his wife, and that the restriction should be reviewed under the *Martinez* heightened-scrutiny standard.⁵² The court deemed the wife's rights irrelevant to its determination and therefore adopted the *Turner v. Safley* Court's analysis,⁵³ which set out guidelines for determining reasonableness.⁵⁴ In his dissent, Judge McMillian recognized that the Bureau's policy directly infringed the rights on nonprisoners, but hesitated to apply *Martinez* because of its questioned validity after *Thornburgh*.⁵⁵

C. Application of the *Turner v. Safley* Analysis

After determining that the appropriate standard of review for the challenged regulation was the rational basis test, the court in *Goodwin v. Turner* proceeded to decide whether the criteria set forth in *Turner v. Safley* were met.⁵⁶ Satisfaction of the *Safley* criteria establishes reasonableness.⁵⁷ The *Safley* test first requires a "'valid rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it."⁵⁸ The Eighth Circuit held that the legitimate governmental interest was achieving the Bureau-created policy of equal treatment of the sexes.⁵⁹ While equal treatment of male and female inmates is not constitutionally mandated, the majority reasoned that it was indeed a legitimate interest.⁶⁰ The court decided that the Bureau did not have to accommodate Goodwin's simple request because it would not be able to afford medical services to accommodate pregnancies of its female prisoners.⁶¹ The majority reasoned that if the Bureau could not protect the procreation rights of female inmates, male and female prisoners would be treated differently with respect to artificial insemination.⁶² Thus, the court

41 (1990).

⁵² See *Goodwin v. Turner*, 908 F.2d 1395, 1399 (8th Cir. 1990).

⁵³ See *Safley*, 482 U.S. at 78, 89-91.

⁵⁴ See *Goodwin*, 908 F.2d at 1399.

⁵⁵ See *id.* at 1401 n.1 (McMillian, J., dissenting).

⁵⁶ See *id.* at 1398-1400.

⁵⁷ See *Safley*, 482 U.S. at 89-91.

⁵⁸ *Goodwin*, 908 F.2d at 1399 (quoting *Turner*, 482 U.S. at 89).

⁵⁹ See *id.* at 1400.

⁶⁰ See *id.* (citing *Madyun v. Franzen*, 704 F.2d 954, 962 (7th Cir. 1983)).

⁶¹ See *id.*

⁶² See *id.*

held that the Bureau's interest in treating all inmates equally to the greatest extent possible is rationally related to the prison prohibition on inmate procreation.⁶³

Judge McMillian, in his dissent, argued that denying Goodwin the right to procreate was not rationally related to the equal treatment policy.⁶⁴ He asserted that in order to satisfy the first prong of the *Turner* test, the objective underlying the regulation must be neutral and legitimate, and the regulation or policy must be rationally related to that objective.⁶⁵ Judge McMillian reasoned that the equal treatment policy is indeed legitimate as a general matter, but not when it was "accomplished at the expense of denying the exercise of an otherwise accommodatable constitutional right."⁶⁶ Judge McMillian also argued that the equal treatment objective becomes relevant only if "we accept the Bureau's speculation that granting Goodwin's novel request will lead to numerous requests by female inmates, and thus result in added financial burdens and profound administrative problems."⁶⁷ Noting that the majority did not offer any evidence to support the Bureau's belief that granting Goodwin's request would lead to a large number of requests from female inmates for artificial insemination, McMillian asserted that the interest in equal protection is merely speculative.⁶⁸

After determining that the Bureau's position was not legitimate, Judge McMillian next considered whether the Bureau's blanket prohibition of artificial insemination is rationally related to its interest in treating inmates equally.⁶⁹ He maintained that "[i]f equal treatment is a sufficient basis to deny inmates [an] otherwise accommodatable constitutional right[], then prisons would never be required to accommodate such rights because it is quite likely that any asserted right might legitimately be withheld from some inmates somewhere."⁷⁰ The dissent was correct in maintaining that the blanket prohibition of artificial insemination is not rationally related to the prison's interest in equal treatment, because equal treatment is not rationally furthered by denying all inmates a constitutional right simply because it might legitimately be withheld from some.⁷¹

⁶³ See *id.*

⁶⁴ See *id.* at 1405 (McMillian, J., dissenting).

⁶⁵ See *id.* (McMillian, J., dissenting).

⁶⁶ *Id.* at 1404 (McMillian, J., dissenting).

⁶⁷ *Id.* at 1405 (McMillian, J., dissenting).

⁶⁸ See *id.* (McMillian, J., dissenting).

⁶⁹ See *id.* (McMillian, J., dissenting).

⁷⁰ *Id.* (McMillian, J., dissenting).

⁷¹ See *id.* (McMillian J., dissenting).

The *Goodwin* majority's decision to uphold the Bureau's blanket prohibition of artificial insemination is questionable for several reasons. The court justified this restriction based on the impracticality of treating male and female inmates' procreational rights equally.⁷² While courts should aspire to equal treatment in the prison context,⁷³ they cannot ignore the biological differences that exist between men and women.⁷⁴ Obviously, if the Bureau allowed female inmates equal access to methods of artificial insemination, this would raise significant institutional concerns not implicated when prison officials allow males to deposit their sperm in a clean container.⁷⁵ Therefore, male and female inmates are not similarly situated with respect to procreation, and courts should not uphold policies denying male inmates the right to artificially inseminate their wives solely because biological differences between the sexes would not permit the same opportunities to be afforded to women inmates.⁷⁶

The Eighth Circuit's decision in *Goodwin v. Turner* is also suspect because male inmates' requests for artificial insemination do not necessarily implicate legitimate penological concerns, such as internal security and discipline. All that would be required is a sterile container and a means of transporting their semen out of the prison complex,⁷⁷ and the majority did not state how providing this sterile container would hinder penological concerns. Furthermore, the *Goodwin* court's holding also opens the door for prison officials to institute policies denying prisoners accommodatable rights. When the courts review these policies, the equal treatment argument could be used to deny prisoners any asserted right.⁷⁸ No

⁷² See *id.* at 1399-1400.

⁷³ See, e.g., *Inmates of Allegheny County Jail v. Wecht*, 565 F. Supp. 1278, 1286 (W.D. Pa. 1983) (holding that prison officials should afford male and female inmates equal access to the library).

⁷⁴ See, e.g., *Rostker v. Goldberg*, 453 U.S. 57, 78-79 (1981) (holding that a congressional decision requiring only men to register for the draft did not violate equal protection because men and women are not similarly situated with respect to conscription).

⁷⁵ See *Goodwin*, 908 F.2d at 1400. The *Goodwin* majority cited numerous problems with allowing female inmates to be artificially inseminated, including significant increases in medical services for female inmates and the financial burden of infant care. See also Davis, *supra* note 11, at 185-87.

⁷⁶ If this were the case, then the courts would have denied women inmates the right to elect an abortion in the name of equality. See, e.g., *Monmouth County Correctional Institutional Inmates v. Lanzaro*, 834 F.2d 326 (3d Cir. 1987).

⁷⁷ See *Goodwin*, 908 F.2d at 1397, 1399 n.7.

⁷⁸ See *id.* at 1405 (McMillian, J., dissenting); see also Irah H. Donner, *Goodwin*

legitimate penological interests⁷⁹ are furthered by refusing Goodwin's artificial insemination request, so the prison's blanket prohibition on artificial insemination for inmates is not rationally connected to a legitimate governmental interest and thus should not have survived the first prong of the *Turner* rationality test.

The next prong of the *Turner* test focuses on whether an alternative means of exercising the asserted right is available to the prisoner.⁸⁰ The majority in *Goodwin v. Turner* found that even absent any alternatives, the regulation is still reasonable because "none can exist without compromising prison policy or expending a large amount of prison resources accommodating the requests of its female prisoners."⁸¹ The court held that this absence of ready alternatives constitutes evidence of the reasonableness of the Bureau's policy.⁸²

Judge McMillian argued in dissent that the majority misapplied this prong of the *Turner* standard.⁸³ He specifically took issue with the majority for considering prison administration interests as part of this second prong, as the *Turner* standard specifically mandates that prison interests be weighed in the third prong and not the second.⁸⁴ Additionally, Judge McMillian argued that it was incorrect to minimize Goodwin's deprivation merely because there were no alternatives that would not compromise prison policy.⁸⁵ Rather, he insisted, prison officials should not be afforded a great deal of deference when alternatives are not available.⁸⁶ Judge McMillian concluded that absent alternatives available to Goodwin, the second prong weighed in favor of his right to procreate, and accordingly the regulation failed to satisfy the second prong of the *Turner* test.⁸⁷

The third prong of the *Turner* test focuses on the effect that accommodating Goodwin's right would have on other prisoners,

v *Turner: Cons and Pro-Creating*, 41 CASE W. RES. L. REV. 999, 1006 (1991).

⁷⁹ In addition to security measures, denying male inmates the right to procreate does not facilitate any of the other penological objectives, such as rehabilitation, retribution, incarceration, or incapacitation. *See supra* notes 13-15 and accompanying text for a discussion of legitimate penological interests.

⁸⁰ *See Turner v. Safley*, 482 U.S. 78, 90 (1987).

⁸¹ *Goodwin*, 908 F.2d at 1400.

⁸² *See id.*

⁸³ *See id.* at 1406 (McMillian, J., dissenting).

⁸⁴ *See id.* (McMillian, J., dissenting); *see also Turner*, 482 U.S. at 90.

⁸⁵ *See Goodwin*, 908 F.2d at 1405-06 (McMillian, J., dissenting).

⁸⁶ *See id.* at 1406 n.7 (McMillian, J., dissenting).

⁸⁷ *See id.* at 1406 (McMillian, J., dissenting).

corrections officers, and the allocation of prison resources.⁸⁸ The *Goodwin* court concluded that if Goodwin's request to be permitted to procreate was granted, the Bureau would be forced to grant its female inmates the same right. This would lead to a "ripple effect,"⁸⁹ in that once female inmates were granted the right to be artificially inseminated, the Bureau would have to provide medical services for them, thereby taking away resources from security and other legitimate penological interests.⁹⁰ The court considered both the risks and costs of accommodating male and female inmates under this factor, and concluded that these costs weighed in favor of denying inmates of both sexes the right to procreate.⁹¹ However, the majority implicitly acknowledged that Goodwin's request could be accommodated without any impact on inmates or prison resources, and provided no basis for its assertion that granting male prisoners this right would lead to a "ripple effect" of requests by female inmates. Since accommodating Goodwin's request would only require supplying him with a clean container and quickly transporting the semen to his wife outside the prison, for which he agreed to pay the costs, his request would not jeopardize prison security or resources.

The dissent concluded that male and female inmates did not have to be treated equally with respect to the right to procreate.⁹² Judge McMillian argued that the potential impact of permitting the insemination of female inmates should not be considered in the third prong.⁹³

Finally, the fourth prong of the *Turner* test examines whether there are any regulatory alternatives to the challenged prison regulation.⁹⁴ Here, the majority's analysis is especially problematic because it failed to address this prong. The dissent, by contrast, suggested two alternatives to the Bureau's blanket policy of prohibiting all inmates from employing the artificial insemination method to procreate.⁹⁵ The first alternative is that the Bureau could consider insemination requests on a case-by-case basis.⁹⁶ If a request would unduly burden the prison, then it need not be granted.⁹⁷ The second alternative is that the Bureau would promulgate a policy permitting

⁸⁸ See *Safley*, 482 U.S. at 90-91.

⁸⁹ *Goodwin*, 908 F.2d at 1400.

⁹⁰ See *id.*

⁹¹ See *id.*

⁹² See *id.* at 1406 (McMillian, J., dissenting).

⁹³ See *id.* (McMillian, J., dissenting).

⁹⁴ See *Turner v. Safley*, 482 U.S. 78, 90 (1987).

⁹⁵ See *Goodwin*, 908 F.2d at 1407 (McMillian, J., dissenting).

⁹⁶ See *id.* (McMillian, J., dissenting).

⁹⁷ See *id.* (McMillian, J., dissenting).

insemination only if it would not significantly burden the prison.⁹⁸ Since alternative prison regulations are possible, the fourth prong of the *Turner* test seems to weigh in favor of accommodating Goodwin's request.

In summary, all four prongs of the *Turner* test weigh in favor of granting Goodwin's request. The policy of equal treatment of prisoners is a legitimate governmental interest as a general matter, but it is not rationally related to prohibiting all inmates from artificially inseminating their spouses. Especially troubling is the majority's failure to apply the fourth prong of the reasonableness test to the specific facts of *Goodwin*. Perhaps the majority believed that the lack of regulatory alternatives available to Goodwin directly disfavored accommodating his request. However, by neglecting to analyze the fourth prong, the court undermined its entire argument. The majority acknowledged that "in deciding whether the challenged regulation meets this reasonable basis test, *Turner* instructs us to consider [four] various factors;" thus, its failure to discuss the fourth prong of the test, regulatory alternatives, should automatically require a decision in favor of Goodwin, because the court did not satisfy all prongs of the *Turner* test and therefore did not meet its burden of demonstrating a reasonable relation between a legitimate penological interest and the blanket restriction on a fundamental constitutional right. Nonetheless, even if the court had addressed the fourth prong of the *Turner* test, the Bureau's decision still would not be reasonably related to a legitimate penological interest, and thus would not pass muster under the *Turner* rational relationship standard of review.

The Supreme Court has held that the privacy interest in the right to procreate should not be discarded lightly.⁹⁹ While the Court recognizes that inmates' rights may be abridged to preserve and facilitate penological objectives, the Court also has stated that there needs to be a rational relation between restrictions on inmates' rights and the furthering of the penological interest. The court's opinion in *Goodwin v. Turner* is therefore troubling because the majority did not successfully demonstrate the existence of a reasonable relation in upholding a blanket restriction on procreation as a necessary means of furthering the legitimate penological interest of treating all inmates equally.

⁹⁸ See *id.* In *Turner v. Safley*, the Supreme Court endorsed alternatives that accommodate constitutional rights on a case-by-case basis. This demonstrates that the Supreme Court favors alternatives that do not unconditionally deny a constitutional right to prisoners. See *Safley*, 482 U.S. at 93-98 (discussing alternatives).

⁹⁹ See *Carey v. Population Servs. Int'l*, 431 U.S. 678, 685 (1977).

IV PROCREATION RIGHTS UNDER JEWISH LAW

It is somewhat difficult to use Jewish law (halacha)¹⁰⁰ and theology to comment on a decision like *Goodwin v. Turner*. While the legal discussion in *Goodwin v. Turner* revolved around rights, halacha focuses on responsibilities. Halacha demands the observance of many different commandments ("mitzvot") of both Biblical and Rabbinic origin. Although halacha does discuss property rights at length, it rarely talks about an individual's right to limit state power. Halacha does not articulate a "right to procreate." This is because of a fundamental difference in orientation between halacha and American law.

Despite this dissimilarity in orientation, one can examine halacha with an eye to eliciting its view of *Goodwin v. Turner*. To begin with, one of the mitzvot is to procreate. This is not viewed in halacha as a right, but as a commandment, something one must do. However, only a governmental authority that is guided by halacha would be obligated to facilitate the observance of the mitzvot, and certainly could not specifically block the performance of the mitzvot. In addition, the Bible enjoins courts not to overstep their bounds when punishing those found guilty of a crime.¹⁰¹ On occasion, different halachic values conflict with each other. These conflicts are resolved by establishing a hierarchy of values to decide which commandment should take precedence. By examining what place procreation takes in this hierarchy of halachic values, we can infer its relative importance.

A. *The Biblical and Talmudic Basis of the Commandment to Procreate*

This section begins with a discussion of the mitzvah (singular of "mitzvot") to procreate, and examines the scope of this mitzvah. Noted are exemptions from this mitzvah, as well as the halachic sources that highlight the great importance given to procreation in the Jewish tradition. The section also discusses whether one can fulfill the mitzvah of procreation through artificial insemination. Even in the absence of an actual mitzvah to procreate, the Jewish tradition sees procreation as an important, fundamental human activity. As a matter of public policy, procreation should be encouraged, assuming it does not cause undue stress to the society or its member institutions.

¹⁰⁰ For an excellent introduction to halacha regarding procreation generally, see DAVID M. FELDMAN, BIRTH CONTROL IN JEWISH LAW 46-59 (1968).

¹⁰¹ See *Deuteronomy* 25:3.

Genesis 1:28 says: "And God blessed them [Adam and Eve]; and God said unto them be fruitful and multiply." This blessing echoes one given to the birds and fish in *Genesis* 1:22. Similar blessings are found elsewhere in *Genesis*, including blessings given to Noah (*Genesis* 9:1, 9-7), Abraham (*Genesis* 17:1-2, 6-8), and Jacob (*Genesis* 35:11-12). Yet the verse in *Genesis* 1:28 is understood by the Talmud as a mitzvah to procreate.¹⁰² Some medieval Jewish commentaries to the Bible explain that the Talmudic ruling is based on an ancient oral tradition,¹⁰³ which was later related to the verse in *Genesis* 1:28. Nachmanides explains that this mitzvah can be derived from the redundant "and God said unto them."¹⁰⁴ Gersonides explains that the mitzvah to procreate can be logically deduced from the blessing to procreate.¹⁰⁵ Man, unlike animals, can choose if he wants to procreate; if all men were to choose not to procreate, God's blessing would be rendered ineffective. Therefore, God's blessing implies a mitzvah to procreate.

The number and gender of children necessary to fulfill the mitzvah to procreate is a matter of debate in the Mishnah and Talmud.¹⁰⁶ The opinion that is accepted as normative is that the mitzvah is fulfilled after having both a son and a daughter.¹⁰⁷ These need not be natural children; infertile couples can fulfill the mitzvah by adopting children.¹⁰⁸

¹⁰² See *Yebamot* 63b. However, there is an opinion cited in the Talmud that the source for the commandment to procreate is found in *Genesis* 35:11-12. See *Yebamot* 65b and *Tosafot* s.v. "velo."

¹⁰³ See the commentaries of Ibn Ezra and Radak to *Genesis* 1:28.

¹⁰⁴ Commentary of the Ramban and Rabbeinu Nissim to *Genesis* 1:28.

¹⁰⁵ See Commentary to *Genesis* 1:28.

¹⁰⁶ The Mishnah in *Yebamot* 61b says it is a matter of disagreement between the first-century Rabbinic schools of Beit Shammai and Beit Hillel. The Talmud, in *Yebamot* 62a, cites other versions of this disagreement. Among the other opinions the Talmud mentions are that one must have two sons and two daughters to fulfill this commandment or that even one child, of either gender, is sufficient to fulfill this commandment.

¹⁰⁷ See *Shulchan Aruch Even Ha' Ezer* 1:5. *Meiri*, *Yebamot* 61b, *Teshuvot HaRashba* 3:339, and *Avnei Nezer, Even Ha' Ezer* 1, are of the opinion that, alternatively, one has fulfilled this commandment after having two sons. Cf. *Otzar Haposkim Even Ha' Ezer* 1:5 (no. 29).

¹⁰⁸ See *Chochmat Shlomo, Even Ha' Ezer* 1.1. However, see the discussion on artificial insemination *infra* Part IV.C. It would appear logical that the opinions that exclude artificial insemination from the mitzvah of procreation would also exclude adoption from this mitzvah.

There are two additional Rabbinic commandments to procreate. One is based on the verse in *Ecclesiastes* 11:6, "In the morning sow thy seed and in the evening ("la-erev") do not withhold thy hand." This mitzvah is known in Rabbinic literature as "*la-erev*." This indicates that there is an obligation upon someone who has already had the requisite number of children to continue to procreate.¹⁰⁹ However, this obligation is of a much lower order.¹¹⁰ For this reason, a man who already has fulfilled the mitzvah of procreation with his first wife, and is concerned that if he remarries and has more children with his second wife family harmony will be disturbed, may choose to avoid having more children.¹¹¹ Similarly, some are of the opinion that in order to improve Torah study, one may avoid performing the commandment of "*la-erev*."¹¹² However, Rabbinic opinion strongly disapproves of limiting family size for reasons of convenience.¹¹³

¹⁰⁹ See *Yebamot* 62b; *Shulchan Aruch, Even Ha' Ezer* 1:8. However, Rabbi Naftali Tzvi Berlin, in his commentary *Ha'amek She'alah* (165:3-4), offers the opinion that the Sheiltot is of the opinion that the commandment of "*la-erev*" is of a Biblical nature. His reasoning is that even if one has already fathered the requisite children, there is a concern that these children may not survive. Therefore, one must continue to have children because one cannot be certain of the future of one's present children. This interpretation of the Sheiltot is disputed by Raphael Yoffen in his footnotes to 2 RITVA YEBAMOT 575 n.901 (Jerusalem: Mossad Harav Kook, 1992).

¹¹⁰ The precise status of the commandment of "*la-erev*" is discussed by many authorities. Most commentaries view it as having a lower status than other Rabbinic decrees. It is understood to be a mitzvah that one is commanded to perform if possible. However, one who avoids performing "*la-erev*" is not considered to be a "sinner." See the commentaries of the Ramban, *Milchamot*, and *Baal Hamaor* to the *Rif Yebamot*, pages 19b-20a. The Ramban says that "*la-erev*" is not an enactment ("*takanah*") but rather a preferred mode of action ("*derech eretz*"). Compare the comments of *Teshuvot Maharsham* 6:134 that *la-erev* is on a higher level than other Rabbinic commandments because it is based on a Biblical verse. There is a disagreement if one must sell a Torah scroll to help someone perform the mitzvah of "*la-erev*." See *Shulchan Aruch Even Ha' Ezer* 1:8.

¹¹¹ See *Shulchan Aruch Even Ha' Ezer* 1:8. But see *The Chelkat Mechokek* (1.12) (disagreeing with *Shulchan Aruch* 1:8).

¹¹² See *Ritva, Yebamot* 63b, s.v. "Mah Easeh," *Teshuvot Maharam Mintz* no. 42, *Otzar Haposkim to Even Ha' Ezer* 1:8 (no. 48).

¹¹³ See *Tosafot, Baba Batra* 60b s.v. "Din" (noting that on a communal basis, if each couple would only have two children the community would eventually diminish). See also *Teshuvot Melamed Lehoil* 3:118; FELDMAN, *supra* note 100, at 50-51 (noting that the duty of ongoing procreation is established in Jewish law. Maimonides stated that a man is commanded by the Talmud "not to desist from

Many are of the opinion that the verse in *Isaiah* (45:18) "Not for void did he create this world, but for habitation (*la-shevet*) did he form it" constitutes an additional obligation to procreate.¹¹⁴ The Aruch HaShulchan is of the opinion that Rabbis of the Mishnah saw this verse as the rationale for the Biblical commandment of "be fruitful and multiply," but not an additional commandment of Rabbinic origin.¹¹⁵ The commandment of "*shevet*" may include those who are exempt from the commandment "be fruitful and multiply;" namely, Jewish women and gentiles.¹¹⁶ Unlike the mitzvah of procreation, which requires a male and female child, many are of the opinion that the mitzvah of "*shevet*" is fulfilled with one child. Others are of the opinion that "*shevet*" requires both a male and a female child.¹¹⁷

Despite the fact that the blessing of "be fruitful and multiply" was said to both Adam and Eve, the parents of all humanity, there are Rabbinic opinions that limit the obligation to procreate to specific groups of people. However, it should be noted that even though certain classes of people are exempt from certain mitzvot, someone who is exempt from a mitzvah, but chooses to perform it anyway, is considered meritorious. This is because the rule in halacha is that those who are exempt from a mitzvah, but choose to perform it anyway, receive divine reward for performing the mitzvah.¹¹⁸

The Mishnah quotes a disagreement regarding whether a woman is obligated in the mitzvah to procreate.¹¹⁹ The opinion of the Tanna Kama is that only men are obligated to procreate, while Rabbi Yochanan Ben Berokah disagrees and maintains that both women and men are equally

procreation while he yet has strength.").

¹¹⁴ See *Gittin* 41b, *Tosafot* s.v. "Lo tohu." This point of view is accepted by the vast majority of commentaries. See *Otzar Haposkim* 1:5 (no.30).

¹¹⁵ See *Even Ha' Ezer* 1:4.

¹¹⁶ See *Magen Avraham Orach Chaim* 153:9; *Beit Shmuel Even Ha' Ezer* 1:2. The *Chelkat Mechokek* (1.1) disagrees, and says women are not included in this commandment. The *Be'er Heiteiv* (1:2), in support of the *Chelkat Mechokek*, infers from the *Rambam, Hilchot Issurei Biah* 21:26, that women are excluded from the commandment of "*shevet*." The *Aruch HaShulchan* (1:5) reasons that "*shevet*" would include gentiles.

¹¹⁷ See *Otzar Haposkim* to 1:2 (30).

¹¹⁸ See *Kiddushin* 31a; in regard to the application of this rule to the mitzvah of procreation see *Teshuvot HaRan* 32. In general, on the performance of mitzvot by non-Jews, see Moshe Bleich, *The Role of Manuscripts in Halakhic Decision Making: Hazon Ish, His Precursors and Contemporaries*, 27:2 *TRADITION* 37, 45-48 (Winter 1993) (discussing the performance of mitzvot by non-Jews).

¹¹⁹ See *Yebamot* 65b.

obligated to procreate. The opinion of the Tanna Kama is accepted as normative, and women are exempt from the mitzvah to "be fruitful and multiply"¹²⁰

Several different explanations are given as to why women are exempt from this mitzvah. Some explain that since childbirth is dangerous and painful, it would be inappropriate for the Torah to command women to have children.¹²¹ Others say this exemption is intended to prevent women from being viewed solely in terms of their fertility. By exempting women from the commandment to procreate, women are no longer viewed as "baby-making machines."¹²²

Although women do not have a Biblical mitzvah to procreate, they may be obligated by a Rabbinic mitzvah to procreate. As noted above,¹²³ there is a disagreement whether women are obligated in the mitzvah of "shevet." However, even if women are obligated in "shevet," they may choose not to perform this commandment if they are frightened by the pain they will have during childbirth.¹²⁴ Of course, a woman performs a mitzvah by helping her husband have children, since this is the only way he can perform the mitzvah.¹²⁵

The Talmud says that non-Jews are exempt from the commandment to procreate.¹²⁶ Some medieval authorities assert that non-Jews are also obligated to procreate, and have a different understanding of this Talmudic passage.¹²⁷ The opinion that non-Jews are exempt from this commandment is accepted as normative.¹²⁸ However, despite this exemption, halacha

¹²⁰ There were several early medieval authorities who ruled in accordance with Rabbi Yochanan Ben Berokah. See JEREMY COHEN, "BE FERTILE AND INCREASE, FILL THE EARTH AND MASTER IT": THE ANCIENT AND MEDIEVAL CAREER OF A BIBLICAL TEXT 141-42 (1989).

¹²¹ See *Meshech Chochmah*, Genesis 9:7

¹²² See David Shapiro, *Be Fruitful and Multiply*, in JEWISH BIOETHICS 69 (Fred Rosner & J. David Bleich eds., 1979).

¹²³ See *supra* notes 115-18 and accompanying text.

¹²⁴ See *Teshuvot Chatam Sofer* 3:20. He also says that if a woman has already had children, she may choose not perform the commandment of "shevet" for any reason at all.

¹²⁵ See *Ran*, *Kiddushin* 41a, s.v. "Mitzvah bo."

¹²⁶ See *Sanhedrin* 59b.

¹²⁷ See *Sheiltot* no. 165; *Tosafot Hagigah* 2b, s.v. *lo tohu*. *Teshuvot Shevut Yaakov* 2:134 explains that *Tosafot* is of the opinion that the Talmudic statement exempting non-Jews is disputed by another opinion cited in the Talmud *Yebamot* 62a with regard to children a convert has prior to his conversion.

¹²⁸ See *Shulchan Aruch*, *Even Ha' Ezer* 1:3.

encourages non-Jews to procreate.¹²⁹ Some say the reason this mitzvah is specifically directed to Jews is the small size of the Jewish people – a concern for demographic survival. At the beginning of time, when the commandment was first given, this applied to all humans. As the world's population increased, the mitzvah to procreate was directed to the Jewish people because of their small numbers.¹³⁰

In Jewish law, minors are exempt from the responsibility to perform mitzvot. At age thirteen, a boy reaches majority and is obligated to perform mitzvot. Procreation is an exception to this rule, and the obligation begins at age eighteen.¹³¹ One of the reasons given for this delay is that it has to do with the young man's need to study Torah. If he marries at age thirteen, he will not be able to study Torah at an age that is important to intellectual growth.¹³²

The Talmud says that one may study Torah first, and then marry.¹³³ The Talmud also cites the case of Ben Azzai, who, because his "soul desired Torah," refused to marry.¹³⁴ Some authorities see the case of Ben Azzai as normative; a man may choose to refuse to marry and have children because doing so would impinge on his Torah study.¹³⁵ Others see Ben Azzai as an exception, who because of his overwhelming passion for study was incapable of focusing on the mundane demands of marriage.¹³⁶ According to the latter view, an allowance is made to defer marriage for several years, but even the scholar may not completely avoid having a family.¹³⁷

On occasion, people are exempted from mitzvot if the performance of the mitzvah will cause them pain and suffering. Rabbi Shlomo Zalman Auerbach argues that a hemophiliac may choose not to have children if having children who are hemophiliacs will cause substantial pain and suffering. His reasoning is based on the rule that a person is not obligated to spend more than a fifth of his or her assets to perform a positive

¹²⁹ See *Aruch Hashulchan, Even Ha' Ezer* 1:5.

¹³⁰ See Shapiro, *supra* note 122, at 70.

¹³¹ See *Mishnah Avot* 5:31, *Shulchan Aruch* 1:3. But see *Rambam, Hilchot Ishut* 15:2, who says the mitzvah begins at age 17.

¹³² See *Otzar Haposkim, Even Ha'ezer* 1:3 (no. 13).

¹³³ See *Kiddushin* 29b.

¹³⁴ *Yebamot* 63b.

¹³⁵ See *Rambam, Hilchot Ishut* 1:3; *Shulchan Aruch Even Ha' Ezer* 1:4; *Beit Shmuel Even Ha' Ezer* 1:5.

¹³⁶ See *Ritva, Yebamot* 63b.

¹³⁷ See *Rosh, Kiddushin* 29b; *Aruch HaShulchan* 1.13-14 (quoting an opinion that one may defer until age 24).

commandment¹³⁸ (procreation is categorized as a positive commandment). If someone is willing to pay a large sum, equal to a fifth of his assets, to avoid the suffering of having a terminally ill child, then that person should be exempted from any positive commandment that would cause such pain and suffering.¹³⁹ Similarly, it would seem that a couple who require medical assistance for fertility problems need not spend more than a fifth of their money on fertility treatments and adoption.¹⁴⁰

Another question relevant to this discussion is that of enforcement. Should a Rabbinic court ("beit din") enforce the obligation to be fruitful and multiply? This question is debated in the Talmud.¹⁴¹ The Shulchan Aruch accepts as normative the view that a beit din must enforce the mitzvah to procreate.¹⁴² The Rama says that the current practice is not to enforce the mitzvah to procreate.¹⁴³ Several reasons are mentioned for the custom being to not enforce the mitzvah of procreation. One is that it is impossible to force someone to procreate as he can always claim he has not found a proper mate.¹⁴⁴

Another reason for nonenforcement is based on a passage in the Talmud.¹⁴⁵ The Talmud discusses the enormous pain felt by the Jewish people after the destruction of the Temple, and the various mourning practices that were initiated by the Rabbis. One mourning practice that was proposed was to decree that Jews may not marry and procreate, which would have uprooted the commandment to procreate.¹⁴⁶ However, the Rabbis of the time declined to make this decree because it was too extreme to impose on the community. Although it was not enacted, we no longer treat the mitzvah of procreation in the same way because such a decree is theoretically appropriate. Therefore, we no longer enforce this mitzvah.¹⁴⁷

¹³⁸ See Rama, *Orach Chaim* 656:1.

¹³⁹ See 3 ABRAHAM S. ABRAHAM, NISHMAT AVRAHAM 69-70 (1993).

¹⁴⁰ Any obligation to spend money for the purpose of assisted reproduction assumes that one can perform the mitzvah of procreation with some sort of assisted insemination.

¹⁴¹ See *Ketubot* 77a. There is some question as to whether the discussion in the Talmud is relevant to people living outside of Israel. See *Or Zarua* 653.5 (I:91a); *Rosh Yebamot* 64a; *Mordechai, Yebamot*, no. 50.

¹⁴² See *Even Ha'ezer* 1:3.

¹⁴³ See *id.*

¹⁴⁴ See *Pitchei Teshuva Even Ha' Ezer* 1:5; *Otzar Haposkam* 1:3 (nos. 18, 23).

¹⁴⁵ See *Baba Batra* 61b; *Tosefta Sotah* 15:10. The text of the Talmud cited above is found in the *Mordechai* and differs from the standard Vilna edition.

¹⁴⁶ See *Anaf Yoseph, Baba Batra* 61b s.v. "Din"; *Iyun Yaakov*, loc. cit., s.v. "Din"; cf. *Tosafot* loc. cit. s.v. "Din."

¹⁴⁷ See *Mordechai, Yebamot* no. 50; *Beit Shmuel, Even Ha' Ezer* 1:6.

To summarize, there is a Biblical mitzvah to procreate; however, this mitzvah is limited to Jewish males age eighteen or older. Several additional exemptions are mentioned. While this mitzvah is obligatory on a small percentage of the population, the performance of a commandment by someone who is exempt from it is considered to be laudatory. In addition, halacha has a great interest in procreation. For this reason, those who are exempt from a Biblical commandment to procreate, including women and those men with the requisite children, are included in additional Rabbinic commands. Non-Jews are also encouraged to perform the mitzvah of procreation for this is the will of God.¹⁴⁸

B. Procreation as a "Great Commandment"

Procreation is considered to be a "great mitzvah" ("mitzvah rabbah")¹⁴⁹ since "the world was created for procreation."¹⁵⁰ Because of this special status, the mitzvah of procreation takes precedence over other mitzvot in several places.¹⁵¹

It is prohibited to sell a Torah scroll, even to acquire another sacred object.¹⁵² However, the Talmud says that one may sell a Torah scroll if its proceeds will be used for the sake of marriage or for the study of Torah.¹⁵³ The Drishah understands this rule as allowing a person to sell his own Torah scroll for the purpose of marriage or Torah study, but not to sell his own Torah scroll for the sake of another's marriage or Torah study.¹⁵⁴ The

¹⁴⁸ See *Aruch Hashulchan, Even Ha' Ezer* 1:5.

¹⁴⁹ This term is used by *Tosafot Gittin* 41a, s.v. "Lo," *Gittin* 38a s.v. "Kophin," *Shabbat* 4a s.v. "Vekhi."

¹⁵⁰ *Gittin* 41a.

¹⁵¹ See *Avodah Zarah* 13a (regarding a Kohen leaving Israel for the sake of marriage); *Ketubot* 3b-4a (involving the ruling that the consummation of marriage takes precedence over mourning); *Rashba, Teshuvot Hameyuchasot LeHaRamban* 272 (regarding the precedence of marriage over the commandment to honor parents); see also COHEN, *supra* note 120, at 173-80.

¹⁵² See *Megillah*. There is a disagreement if this refers only to a Torah that belongs to the community, or even to a Torah owned by an individual. See *Shulchan Aruch, Orach Chaim* 153:10, and the comments of the *Magen Avraham* in 153:23.

¹⁵³ See *Megillah* 27a; *Tosafot, Baba Batra* 8b, s.v. "Kophin" say that one may sell a Torah scroll for the sake of ransoming captives. This ruling is accepted by the *Shach, Yore Deah* 252:1.

¹⁵⁴ See *Drishah, Yoreh Deah* 252:1.

reason he is allowed to sell a Torah scroll for the sake of marriage is that it benefits himself. The Shach disputes this ruling, and says that one must sell a Torah scroll even for the sake of another's marriage.¹⁵⁵

Some extend this rule to allow the sale of a Torah scroll for the sake of a woman's marriage. Although she is not obligated in the mitzvah of procreation, she is obligated in the commandment of "shevet."¹⁵⁶ The fact that one is obliged to sell a Torah scroll, something that is otherwise forbidden, for the sake of marriage, indicates that the mitzvah of procreation has special status.

Jewish law attempts to abolish slavery as an institution; however, because it was so strongly rooted in the ancient world, it was impossible for it to be uprooted at once.¹⁵⁷ A half-slave half-freeman would find himself in limbo with regard to procreation.¹⁵⁸ A half-slave half-freeman is neither completely Jewish (because he is a half-slave), nor completely a non-Jew (because a slave has the status of a partial Jew¹⁵⁹). Such a person would not be capable of marrying and procreating, for there would be no one that he could marry! For this reason, a decree was imposed that a master must free his half-slave, with the slave agreeing to repay what the master loses by freeing him. This extraordinary decree, which usurps the property rights of the master, is based on the idea that "the world was created for the sake of procreation,"¹⁶⁰ and highlights the special standing the mitzvah to procreate takes in halacha.

There is a disagreement whether the decree forcing the master to free his half-slave is enforced even when the master will violate a mitzvah as a result. Tosafot is of the opinion that the mitzvah to procreate is of such great significance that it takes precedence above other positive mitzvot, and

¹⁵⁵ See *Shach, Yoreh Deah* 252:1. This, of course, is when the sale does not exceed the limits of charity.

¹⁵⁶ See *Magen Avraham Orach Chaim* 153:9; *Beit Shmuel, Even Ha' Ezer* 1:2. However, the *Chelkat Mechokek* (*Even Ha' Ezer* 1.1) disagree. See the discussion in *Otzar Haposkam* 1:2 (no. 11).

¹⁵⁷ See the discussion by the late Chief Rabbi of Israel, 1 ISAAC HERZOG, *THE MAIN INSTITUTIONS OF JEWISH LAW* 45 (2d ed. 1967).

¹⁵⁸ See *Gittin* 41b. As to whether there actually existed half-slave half-freemen, or whether this is merely a theoretical case used to encourage, see the opinions cited by COHEN, *supra* note 120, at 155.

¹⁵⁹ See *Shulchan Aruch, Even Ha' Ezer* 4:11 (regarding the status of a slave in Jewish law).

¹⁶⁰ *Gittin*, 41b.

is comparable to a communal mitzvah.¹⁶¹ While the Rashba,¹⁶² Ran,¹⁶³ and Meiri¹⁶⁴ take alternate approaches, it is the approach of Tosafot that has had the greatest impact on subsequent halachic literature.¹⁶⁵

The Talmud talks extensively about the importance of procreation. Refusal to procreate is compared (in an exaggerated way) to the spilling of blood.¹⁶⁶ This is because a refusal to procreate will cause negative population growth and threaten the future of the human race.¹⁶⁷ In addition, one who does not procreate is as if he has diminished the divine image.¹⁶⁸ This means that when humans, who are created in the divine image, refuse to procreate, they are diminishing their divine image. This explanation views the refusal to procreate as a lack of one's personal fulfillment, a loss of one's human potential.

C. Is the Mitzvah of Procreation Fulfilled by Artificial Insemination?

The possibility that a woman may become pregnant by accident from semen that was expelled in a bathhouse or onto a sheet is discussed by the Talmud¹⁶⁹ and Medieval commentaries.¹⁷⁰ The possibility that a man may impregnate a woman without sexual intercourse raises a question: Could Goodwin, were he Jewish, fulfill the mitzvah of procreation with artificial insemination? The Beit Shmuel asserts that a child produced by an

¹⁶¹ See *Shabbat* 4a, s.v. "Hah"; *Gittin* 41b s.v. "Mitzvah."

¹⁶² See *Gittin* 38a, s.v. "HaMaphkar Avdo."

¹⁶³ See *Gittin* 38a, s.v. "Kol."

¹⁶⁴ See *Gittin* 38a, s.v. "HaMishachrer."

¹⁶⁵ This is primarily because of inconsistencies in the approaches of the Ran and Rashba. See *Minchat Chinuch* no. 247; *Magen Avraham, Orach Cham* 90:30.

¹⁶⁶ See *Yebamot* 63b.

¹⁶⁷ See *Maharsha* loc. cit.

¹⁶⁸ See *Yebamot* 63b. For more on the theology of procreation, see COHEN, *supra* note 120, at 67-123, 196-220.

¹⁶⁹ See *Hagigah* 15a.

¹⁷⁰ See *Alpha Beta LeBen Sira*, in J.D. EISENSTEIN, OTZAR MIDRASHIM 43 (1928); quoted in the *Bach, Yore Deah* 195, s.v. "Velo" (quoting Rabbi Peretz of Corbiel); *Shiltei Gibborim, Shevuot* 2a (Rif pagination); cited in *Birkei Yoseph, Even Ha' Ezer* 1.14 (citing Rabbi Shlomo of London). These discussions revolve around the concern that a woman might become pregnant by a man who is not her husband. For more on artificial insemination in Jewish law, see ABRAHAM, *supra* note 139, at 5-13 (*Even Ha' Ezer*); FRED ROSNER, MODERN MEDICINE AND JEWISH ETHICS 85-101 (2d ed. 1991); and Alfred Cohen, *Artificial Insemination*, J. HALACHA & CONTEMP SOC'Y 13 (1987).

accidental pregnancy in a bathhouse is considered the father's heir in all matters, and that the father has fulfilled the mitzvah of procreation.¹⁷¹ Some disagree with the Beit Shmuel because of a concern that there is no reliable evidence about paternity when a woman becomes accidentally pregnant in a pool, and therefore the putative father cannot be certain that he fulfilled the mitzvah of procreation.¹⁷² This concern would not be applicable to a case of artificial insemination where the father is clearly known. Disagreeing, the Taz says that the mitzvah of procreation demands that the father do some action meant to father a child and that when a woman becomes pregnant by semen left in a bathhouse, the father is completely passive and unaware of the pregnancy.¹⁷³ Rabbi Jacob Emden¹⁷⁴ states that when a woman becomes pregnant in a bathhouse, the father had no intent to have a sexual or paternal relationship, and that in order to fulfill the mitzvah of procreation, one must have, at a minimum, intent for sexual intercourse.¹⁷⁵

Rabbi Isaac Jacob Weiss argues that artificial insemination is superior to an accidental bathhouse pregnancy in regard to the mitzvah of procreation. This is because one of the objections to fulfilling the mitzvah of procreation with a bathhouse pregnancy is that the father is completely passive. However, when the father endeavors to have a child by artificial insemination, those efforts are sufficient to fulfill the mitzvah of

¹⁷¹ See *Even Ha' Ezer* 1:10.

¹⁷² See sources quoted in ABRAHAM, *supra* note 139, at 10.

¹⁷³ See *Even Ha' Ezer* 1:8.

¹⁷⁴ See *She'alat Ya'avetz* 2:97. The issue of what type of intent one must have while performing the mitzvah of procreation is discussed in *Otzar Haposkim* 1.1 (no. 4) and Rabbi Herschel Schachter, *Halachic Aspects of Family Planning*, IV J. HALACHA & CONTEMP SOC'Y 7 n.9 (1982).

¹⁷⁵ These disagreements are based on a difference of understanding of what the mitzvah of procreation entails. To some, the mitzvah of procreation is to engage in sexual intercourse with a woman who is capable of having children. The actual arrival of two children, male and female, is only a limit to when one may stop trying to have children. This point of view is adopted by Waldenberg. See *infra* note 178. Others say that having children is the mitzvah and that sexual intercourse is only a preliminary to having children. This view is adopted by the *Minchat Chinuch*, Mitzvah 1. Within this view, there is room for the debate between the Taz and Beit Shmuel about the need for an action on the part of the father. A final point of view (mentioned earlier) is that of the *Chochmat Shlomo*, *Even Ha' Ezer* 1.1, who sees the mitzvah of procreation as one of parenting, of the man playing the role of father for an adopted or genetic child.

procreation.¹⁷⁶ Rabbi Eliezer Waldenberg disagrees, for between ejaculation and conception, the father's semen is handled by the doctor, and the father has no control over whether conception actually takes place. In addition, Waldenberg argues that to fulfill the mitzvah of procreation the pregnancy must be the result of sexual intercourse.¹⁷⁷ One can argue that even if one adopts the more stringent view that artificial insemination is not a technically valid way to perform the mitzvah of procreation, bearing children via artificial insemination would still have halachic value. This is because one can say that having a child, even without sexual intercourse, is fulfilling the intent of the mitzvah. So, although there may be no divine reward received for performing the mitzvah of procreation, fathering children, in whatever manner, should at least exempt someone from the mitzvah to procreate.¹⁷⁸

CONCLUSION

As the above discussion of the mitzvah to procreate shows, there are very different tendencies in halacha. There is a tendency to limit the obligation of this mitzvah. The mitzvah is limited to Jewish males age eighteen or older. Exemptions and deferrals are given for Torah scholars and for people for whom procreation will be an exceptional emotional, physical, or financial burden. Unlike many other mitzvot, the mitzvah to procreate is not enforced by a beit din, and no penalties are assessed for noncompliance. Despite limiting the obligation of procreation, halacha still recognizes that procreation is the fulfillment of a mitzvah and strongly encourages it. Another tendency is to give the mitzvah of procreation special status "because the world was created for procreation."¹⁷⁹ Because of this special status, certain religious obligations and financial rights are waived in favor of the mitzvah of procreation.

We conclude that prison officials are bound to help prisoners who are obligated to procreate perform this mitzvah, just as the community is

¹⁷⁶ See *Minchat Yitzchak* 1:50; cf. *Yabia Omer, Even Ha Ezer* II:1.

¹⁷⁷ See *Tzitz Eliezer* 3:27:3. For more sources on this topic see ABRAHAM, *supra* note 139, at 10, and *Otzar Haposkam Even Ha' Ezer* 1:6 (no. 42).

¹⁷⁸ This assumes that children born via artificial insemination are viewed as the halachic children of the father. For support of this argument, see *Yebamot* 62a, regarding children born to converts prior to conversion; *Tosafot, loc cit., s.v. "Bnei"*; *Rambam, Hilchot Ishut* 15:6. For a similar argument, see Rabbi Tzvi Pesach Frank, *Teshuvot Har Tzvi, Orach Chaim* II:76.

¹⁷⁹ *Gittin* 41a.

obligated to sell a Torah scroll. The prison would have to spend a reasonable amount of money to help the prisoner procreate. This is true provided it causes no severe financial or security problem. If it does, then the prison can refuse because of the burden involved. To lessen the hardship placed on prison authorities, they can demand that the prisoner procreate through artificial insemination, and not through conjugal visits.¹⁸⁰

For a prisoner who does not have a mitzvah to procreate there are several different factors to be considered. The enormous prestige given to procreation even in instances when it is not a mitzvah suggests that public policy formulated on the basis of halacha would demand that prison officials be flexible and helpful in the performance of procreation. Any unnecessary inflexibility of prison officials could possibly result in visiting an unintended punishment on the prisoner, thereby violating the Biblical commandment against excessive punishment.¹⁸¹ It would therefore be incumbent upon prison officials to respond to requests like Mr. Goodwin's with an open mind.

¹⁸⁰ This is true even though onanism ("hashhattat zera") generally violates halacha. See ABRAHAM, *supra* note 139, at 107-13. Since the prisoner may procreate by artificial insemination if he has no other choice, the prison officials are not required to endure any hardship to help the prisoner avoid hashhattat zera that is sanctioned. The reasoning behind this is based on *Minchat Shlomo*, no. 7.

¹⁸¹ See *Deuteronomy* 25:3.

